

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DUNCAN J. McNEIL, III,)	
)	
Plaintiff,)	
v.)	CASE NO. 2:05-cv-587-F
)	WO
UNITED STATES, <i>et al.</i> ,)	
)	
Defendants.)	

ORDER

This cause is now before the Court on the plaintiff's Notice of Appeal (Doc. #8) and motion for leave to proceed on appeal *in forma pauperis* (Doc. #9) filed on November 28, 2005.

Title 28 U.S.C. § 1915(a)(3) provides that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." In making this determination as to good faith, a court must use an objective standard, such as whether the appeal is "frivolous." *Coppedge v. United States*, 369 U.S. 438, 445 (1962). "The statute provides that a court 'may dismiss the case if the allegation of poverty is untrue, or if

¹ See 28 U.S.C. § 1915(e):

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

satisfied that the action is frivolous or malicious.” *Attwood v. Singletary*, 105 F.3d 610, 613 (11th Cir. 1997) (citing 28 U.S.C. § 1915(d) (1996)).

This circuit has defined a frivolous appeal under section 1915(d) as being one “‘without arguable merit.’” *Harris v. Menendez*, 817 F.2d 737, 739 (11th Cir.1987)(quoting *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir.1976)). “‘Arguable means capable of being convincingly argued.’” *Moreland v. Wharton*, 899 F.2d 1168, 1170 (11th Cir.1990) (per curiam) (quoting *Menendez*, 817 F.2d at 740 n. 5); see *Clark*, 915 F.2d at 639 (“A lawsuit [under section 1915(d)] is frivolous if the ‘plaintiff’s realistic chances of ultimate success are slight.’” (quoting *Moreland*, 899 F.2d at 1170)).

Sun v. Forrester, 939 F.2d 924, 925 (11th Cir. 1991), *reh’g denied*, 503 U.S. 999 (1992). See also *Weeks v. Jones*, 100 F.3d 124, 127 (11th Cir. 1996) (stating that “Factual allegations are frivolous for purpose of [28 U.S.C.] § 1915(d) when they are ‘clearly baseless;’ legal theories are frivolous when they are ‘indisputably meritless.’”) (citations omitted).

Applying the foregoing standard, this Court is of the opinion that the plaintiff’s appeal is without a legal or factual basis and, accordingly, is frivolous and not taken in good faith.

Accordingly, it is ORDERED that the plaintiff’s motion to proceed on appeal *in forma pauperis* is DENIED and that the appeal in this cause is certified, pursuant to 28 U.S.C.A. § 1915(a), as not taken in good faith.

DONE this 1st day of December, 2005.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE